Supreme Court of the United States.

OCTOBER TERM, 1898.

The Addyston Pipe and Steel Company, Dennis Long & Co., Howard-Harrison Iron Company, Anniston Pipe and Foundry Company, South Pittsburgh Pipe Works, and Chattanooga Foundry and Pipe Works,

Appellants,

No. 269.] *vs.*

The United States,

Appellee.

IN EQUITY.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

SUPPLEMENTAL AND REPLY BRIEF FOR APPELLANTS.

OBSERVATIONS UPON THE EVIDENCE.

In the brief filed for the United States especial effort is made to show from the evidence that the arrangement among the appellants provided:

(1) For arbitrarily fixing the prices at which the cast-iron pipe should be sold to customers;

(2) For completely stifling all competition;

(3) For a bonus *as profits* on each sale;

(4) And, lastly, attention is called to certain transactions and telegrams, with a view of showing, as claimed, first, that appellants always sought to sell their pipe for the highest price they could obtain, and, second, that comparisons between pipe sold within "pay territory" and "free territory" disclose discrepancies, supposed to reflect injuriously upon the nature and effect of the plan in dispute.

If there is error in these efforts, then much if not all of the foundation for learned counsel's argument is unsound.

Referring to these subjects in the order mentioned:

PRICES.

It is necessary to discriminate between the two plans which were in existence during the life of the Pipe Association. The first one had been abandoned, and the second one alone was pursued when this action was commenced. We shall avoid confusion if we assign proceedings of the association to the respective plans to which they severally belonged. The plan under which appellants were operating when the petition was filed is embraced in this resolution:

"*Resolved*, That from and after the 1st day of June, that all competition on the pipe lettings shall take place among the various pipe shops prior to the said letting. To accomplish this purpose, it is proposed that the six competitive shops have 'a representative board' located at some central city, to whom all inquiries for pipe shall be referred, and said board shall fix the price at which said pipe shall be sold, and bids taken from the respective shops for the privilege of handling the order, and the party securing the order shall have the protection of all the other shops." (R., p. 70.)

A moment's reflection will show that the words, "said board shall fix the price at which said pipe shall be sold,"

do not mean the price at which the pipe shall be sold at any public letting, but the price at which the pipe shall be sold as among themselves when determining upon what one of the companies should put in its proposal for the work. Two considerations prove this. One is that in the nature of things the board of representatives could not so far in advance know what sum to fix with respect to a public letting. The other is that the company selected to make the proposal not only obtained the right in virtue of paying the highest bonus, but was actually accorded the right to offer at the public letting a lower price than the one fixed by the board. The necessary result is that the words relating to the fixing of the prices must have had reference to something else. We maintain that those words referred to sales made as between the representatives of the companies themselves of the privilege of bidding. The following extract from minutes of board of representatives is an illustration (R., p. 74):

"Res. 8. W. L. Davis moved to sell the 519 pieces of 20" pipe for Omaha, Neb., for $23.40 delivered.

"Seconded by D. R. P. Dimmick. Carried.

"Res. 9. F. B. Nichols moved that Anniston participate in this bonus *and the job be sold over the table.*

"Seconded by W. L. Davis. Carried.

"Pursuant to the motion the 519 pieces of 20" pipe for Omaha *was sold to Bessemer* at a premium of $8. (J. W. T.)."

Further in support of this claim, we call attention to that part of the answer which refers to the meetings of the representatives of the companies. After stating the purpose of agreeing upon a price among themselves, it proceeds (R., p. 32):

"The price agreed on, as above stated, among defendants, did not in fact fix or regulate the price at which contracts were obtained, but was only adopted as a fair price, and con-

stituted a basis upon which the defendants could intelligently compete among themselves and determine who should endeavor to secure the order. It was subject to the further modification of that general competition which usually took place, and unless it was further reduced to meet that general competition, or was the lowest offer made, did not secure the contract."

Again, at page 35, the answer states:

"On the contrary, they aver the fact to be that in all agreements, arrangements, and transactions of defendants with each other, and in strict accordance with such mutual understanding of defendants, one of them bidding for supply of such pipe or material had the right to bid, and did bid, any price which might be determined by said defendant so bidding."

These allegations of the answer are not disputed by the Government by any pleading or evidence; but Government counsel draws a contrary inference by reason, as we insist, of his failure to observe the sense in which the words of the resolution were used by the parties themselves.

Our contention is further supported by the uncontradicted evidence of Mr. Callahan, of the Louisville Company, who says (R., p. 219, top):

"Affiant distinctly avers that every one of defendants had the right to, and was expected to, bid for the respective orders such prices as in its judgment would be necessary to obtain the order in competition with the other manufacturers."

If it should be asked why, in view of the liberty which each company possessed to bid a lower price than the sum so agreed upon among the six representatives, there was any necessity to agree upon a price at all, the answer is two-fold: (1) That it was to determine upon what, in the judgment of the companies, would be a reasonable price; and (2) That it

afforded a basis for reducing the amount bid by the successful company by way of bonus wherever it obtained the contract by bidding lower than the price agreed on.

COMPETITION.

The contention made on behalf of the government that the "auction pool" or competitive bonus plan stifled all competition is disproved in several ways. In the first place, there were competitors in the manufacture and sale of cast-iron pipe within the states in controversy whose total manufacturing capacity was greater than that of all of appellants together; while the total manufacturing capacity of all the outside competitors of the country at large was more than twice that of all the appellants together (R., pp. 36–7). In the next place, it is shown by the undisputed evidence of Mr. Callahan that out of twelve hundred contracts let in the year 1896, in the territory mentioned in the petition, the appellants all together were able only to secure four hundred and fifty-seven (R., p. 219). The Government offers no evidence whatever in dispute of this fact.

It is further shown by the evidence of appellants and of their competitors in business, at pages 147, 149, 155, 163, and 164 of the Record, that appellants were required upon all sales made to meet the competition of manufacturers who were in no way connected with this plan.

It is to be observed also, that the very resolution which is quoted above, and which is so severely condemned by Government counsel, in terms provides "that all *competition* on the pipe lettings shall take place among the various pipe shops *prior to the said letting*;" thus clearly implying that competition was intended to be had as between appellants themselves by the competitive bonus system which was substituted for the fixed bonus system. It is true that the plan restricted competition as between appellants themselves at the time bids were actually received by proposed purchasers, but

it is a mistake to say either that all competition was stifled, or that the competition which took place between appellants themselves in determining upon which one should bid for the contract, did not itself tend to reduce prices. That the outside competition was effective, is demonstrated by the fact, before shown, that but little more than one-third of the total number of contracts made in the disputed territory in the year 1896 were obtained by appellants; and that the competition which took place between appellants themselves under their competitive bonus plan tended to reduce the prices so agreed on among themselves for the purpose of carrying out the plan, is a plain sequence from the natural desire of each to obtain the work and keep its foundry going.

The inevitable result of all this is that there was only a partial restriction of competition. The Government must therefore succeed, if it shall succeed at all, upon some other fact than the one so earnestly pressed in the oral argument, as well as upon its brief, that there was a total stifling of competition. The Government must also meet in some way not as yet disclosed, the patent fact that this plan, no matter what may be said of it, was designated for and applied to both local trade and non-local trade. The only exception which can be made to what has just been said is in regard to the "reserved cities." Prior to December, 1895, the fixed bonus plan alone was applied to those cities. At that time it was determined that the representatives of the appellants should fix the prices from time to time, according to the circumstances of each particular purchase; but it must be borne in mind that while certain cities were assigned to particular companies, still those companies, in every instance, were compelled to meet the competition of all other manufacturers who were not parties to the plan. The only difference between the operations of appellants under this plan in regard to the "reserved cities" and in regard to other and different purchasers was, that appellants did not compete

among themselves for the privilege of competing with outsiders in the reserved cities, as they did with respect to other purchasers.

BONUS NOT PROFITS.

The contention of our learned adversary upon this point grows out of a misapprehension of the purpose for which the competitive plan was adopted and of the sense in which the word "bonus" was used by the parties. The resolution of the association shows that the bonus, so-called, was a sum to be divided among the members (R., pp. 64, 65). It is not referred to otherwise. There is nothing in the plan itself to show that the bonus was a sum to be added, as claimed, to a fair price, or, in other words, an arbitrary profit. The idea that the bonus represents an arbitrary sum in excess of a fair price is supported only by the assertion of the informer, McClure. The overwhelming evidence is that its purpose and use were merely to enforce a fair and equitable distribution of the business and work of supplying the demand for pipe among the several plants of appellants.

The answer states (R., p. 30):

"What was miscalled a bonus was more in the nature of a premium, and its only object was, as aforesaid, to restrain any one or more of defendants from monopolizing more than a proper share of the trade within said territory, which object the so-called bonus would not have accomplished if it had been an amount charged over and above a fair price. But being deducted from and paid out of what was a fair price, it did operate so that no one of defendants could do more than its proper share of said work, without doing so at a loss. As all defendants did about their respective portions of work in said territory, the premium or bonuses, so called, equalized each other, and thus accomplished the only object for which they were intended as aforesaid:

These allegations are supported by the evidence of A.

F. Callahan (R., p. 216), C. W. Harrison (R., p. 177), and M. Llewellyn (R., p. 200).

MISLEADING COMPARISONS.

Efforts are made on behalf of the Government to reflect injuriously upon the plan in dispute by comparing prices derived from pipe sold out of miscellaneous stock for ordinary purposes, upon orders by mere telegrams and letters, with prices obtained for pipe made and sold under specifications and subject to tests and inspections. A moment's reflection will satisfy any one that large and miscellaneous stocks of pipe would accumulate in great foundries and that the owners could afford to dispose of the same for culverts and the like at very much less prices than they could manufacture and sell particular kinds under specifications, tests and inspections. These discrepancies occur in all kinds of business. Moreover, it is easy to see that wherever specifications call for high qualities of materials and particular shapes and the like, higher prices will be the consequence; for both the materials and the labor, not to speak of new patterns and the like, must of necessity cost more. Then, again, the cost of drayage in delivering the pipe along the streets or other places, according as required by the specifications, is always an indefinite quantity, and yet is a cost to be taken into account when fixing the price. This cost is not incurred in filling the usual orders received merely by letter or telegram; it is only required under specifications calling for particular kinds of pipe under competitive bidding. Another difference between filling mere telegraphic orders and supplying pipe under specifications is that there is no percentage reserved under the former while there is under the latter. And, again, the manufacturer knows the cost of pig iron in filling a quick order, whereas he must incur the risk of changes in prices of pig iron in filling a time order. All these things are shown by the evidence of appellants and

by evidence, too, of representatives of cities who are familiar with the difference.

See, among others, Callahan, Dimmick and Nichols (R., p. 193); Llewellyn, (R., p. 200); Woodward (R., pp. 166–167); and Marshall (R., pp. 254–256).

ARGUMENT.

I.

THE EVILS SOUGHT TO BE REMEDIED BY THE ADOPTION OF THE COMMERCE CLAUSE AS PART OF THE FEDERAL CONSTITUTION, AND THE LIMITATIONS CONTAINED IN THAT INSTRUMENT TOUCHING THE LIBERTY OF CONTRACT, SHOW THAT IT WAS PUBLIC AND QUASI PUBLIC ACTS, AND NOT PRIVATE CONTRACTS CONCERNING SUBJECTS OF A PRIVATE CHARACTER, WHICH WERE INTENDED TO BE EMBRACED WITHIN THE POWER TO REGULATE COMMERCE.

The unusual prominence which the solicitor-general gave in his brief and oral argument to the mere personal equation of this cause satisfied us at the hearing that this proposition should be urged. Until we received his brief, which was on the day the hearing began, we had thought the case could be solved upon a simple inquiry into whether the plan or contract of appellants directly or indirectly affected interstate trade and commerce. We think so still; but if in error, then we wish to press the inquiry further. Appellants' methods of conducting business, as the learned counsel interprets them, seem in his mind to have greater significance than the question of right in congress to forbid the contract. As it seems to us, mere methods of business sink into insignificance in comparison with the matter of power in congress thus to trench upon the liberty of contract. We would not, however, be understood as alluding to this except only

as an explanation of why the present proposition was urged in the closing argument and is presented in this brief.

The learned solicitor general presented neither argument nor authority upon this question. The subject naturally resolves itself into two parts. The first involves an inquiry into the reason for vesting power in congress to regulate commerce ~~tracts~~ and the consequent scope of the power. The second involves an inquiry into how far the liberty of contract as guaranteed by the federal constitution is a limitation upon the commercial power.

If we show what these evils were, and that they did not comprise private contracts touching matters of private concern, we hardly need suggest that at least one intendment of the organic guaranty of freedom of private contract was that it should be a limitation on the power to regulate commerce.

The evils sought to be remedied by the commercial clause were acts of interference through state legislation and in virtue of it.

In *Kidd* v. *Pearson*, 128 U. S., at p. 21, it is said:

"It was said by Mr. Chief Justice Marshall, that it is a matter of public history that the object of vesting in congress the power to regulate commerce with foreign nations and among the several states, was to insure uniformity of regulation against conflicting and discriminating *state legislation*." (Italics ours.)

In *County of Mobile* v. *Kimball*, 102 U. S., at p. 697, it is said:

"And it is a matter of public history that the object of vesting in congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminating *state legislation*." (Italics ours.)

In *Welton* v. *State of Missouri*, 91 U. S., at p. 280, it is said of the power to regulate commerce:

"The very object of investing this power in the General Government was to insure this uniformity against discriminating *state legislation*." (Italics ours.)

In *Railroad Company* v. *Richmond*, 19 Wall, at p. 589, it is said:

"The power to regulate commerce among the several states was vested in congress in order to secure equality and freedom in commercial intercourse against discriminating *state legislation*; it was never intended that the power should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse." (Italics ours.)

The only reason for the allusion to contracts in the closing sentence of this quotation is that the subject under consideration was a contract of a railroad company that in consideration of the construction of a specified grain elevator, its owner should have the handling at Dubuque, Iowa, of all through grain passing over the railroad for a period of fifteen years, with right to renewal for fifteen years more. It is to be observed, however, that it was a contract with an interstate carrier touching a subject of interstate commerce. Even that kind of a contract was not treated in that case as falling within the commerce clause, for the reason that it was not intended nor made to interfere with interstate trade and commerce.

In *Case of the State Freight Tax*, 15 Wall., at p. 275, after stating that the transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the constitution when the power to regulate commerce was vested in congress, it is said:

"A power to prevent embarrassing restrictions *by any state* was the thing desired." (Italics ours.)

In *Brown* v. *State of Maryland*, 12 Wheat., while speaking upon the kindred provision forbidding any state to lay imposts, or duties on imports or exports, it was said by Mr. Chief-Justice Marshall, at p. 438:

"From the vast inequality between the different states of the Confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, *than the manner in which the several states exercised, or seemed disposed to exercise, the power of laying duties on imports.* From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as *the states* were of any encroachment on it, was so far abridged as to forbid *them* to touch imports or exports, with the single exception which has been noticed." (Italics ours.)

And in regard to the commerce clause, the Chief-Justice said, at p. 445:

"The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; *and our disunited efforts to counteract their restrictions were rendered impotent by want of combination.* Congress, indeed, possessed the power of making treaties; but the inability of the Federal Government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government, contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by congress. . . ." (Italics ours.)

The learned chief justice thereupon concluded that the

geographical limits of the states were not limitations upon commerce, stating, at p. 446:

"This question was considered in the case of *Gibbons* v. *Ogden* (9 Wheat. 1), in which it was declared to be complete in itself, and to acknowledge no limitations *other than are prescribed by the constitution*. The power is coextensive with the subject on which it acts, and can not be stopped at the external boundary of a state, but must enter its interior." (Italics ours.)

In *Gibbons* v. *Ogden*, 9 Wheat. 196, the chief justice spoke of the limitations there stated and above alluded to as "prescribed in the constitution," thus:

"These (limitations) are expressed in plain terms."

It was not necessary in that case to state more than that the matter under consideration did not fall within any of such express limitations. When we come to inquire, however, whether the liberty of private contract is one of the express limitations so alluded to, it is important to remember that private contracts constituted no part of any of the evils which the learned justices of this court have repeatedly said were the evils sought to be remedied by the vesting of the power to regulate commerce in congress. Those evils were the acts of the states themselves.

Of course, any act undertaken by any political subdivision of a state, such as a city, county, or township, under and in virtue of authority vested by the state, should be treated the same as acts of the state itself. The same may be conceded to be true, also, of every other class of agencies of states which are acting in pursuance of state authority, such as common carriers, gas and water companies occupying public streets, public elevator companies and the like. Whether such agencies are mere creatures of the states themselves, like corporations organized to engage in business directly affecting public interests, or whether they be natu-

ral persons voluntarily devoting their property to the public service, and so, in either case, to impress upon the instruments and property so employed a public nature or character, it may well be said that the acts of such agencies shall be subject to the regulation of congress, if the matters so controlled are of a national character; or subject to the regulations of the states, if they be matters of purely local or internal character.

Illustrations of the character of acts here alluded to which may be within the regulating power of government, either national or state, according to the nature of the subject-matter, are found in the class of cases like:

Munn v. *Illinois*, 94 U. S. 113.
Wabash Railway v. *Illinois*, 118 U. S. 557–569.
Dow v. *Biedelmann*, 125 U. S. 689.
Budd v. *New York*, 143 U. S. 517.

The principles laid down in those cases are analogous to those expressed in the recent decisions of this court in the *Trans-Missouri* and *Joint Traffic* cases. We scarcely need say that contracts between interstate common carriers were held to be within the control of congress in the sense that they could be and were inhibited by the anti-trust act.

This principle is further illustrated by *Guy* v. *Baltimore*, 100 U. S. 434:

By an ordinance of the city of Baltimore vessels laden with goods from other states were required to pay for the use of wharves that were free to vessels laden with domestic products.

It was held that the ordinance discriminated against interstate commerce and conflicted with the constitution of the United States.

It was argued in that case (p. 441) that the ownership of the wharves being in the city, it had the right, in its discretion, to permit their use free to vessels laden with domestic

products, and other vessels could not complain if they were charged no more than reasonable compensation. In substance the argument was that, within reasonable compensation, there could be discrimination in favor of domestic products by a municipality owning a wharf. But it was held that this contention though ingenious or plausible, was unsound, because the city of Baltimore was but a part of the state of Maryland, from which it derived authority to adopt ordinances, and that to allow the discrimination in question would be permitting the state to do through one of its agencies, by indirection, what it could not accomplish directly. The ground upon which federal jurisdiction rested is thus stated by Mr. Justice Harlan:

"Municipal corporations, owning wharves upon the public navigable waters of the United States, and *quasi* public corporations transporting the products of the country, can not be permitted by discriminations of that character to impede commercial intercourse and traffic among the several states and with foreign nations." (Page 443.)

It is the same principle, we submit, as announced in the *Traffic* cases.

It has never been held so far by this court that any tax or burden imposed upon commerce was a regulation thereof so as to conflict with the exclusive power of congress, unless "it was a sovereign exaction" (*Packet Co.* v. *Keokuk*, 95 U. S. 86), or what amounts to the same thing, a charge or exaction by some *quasi* public corporation acting under state authority.

The point intended to be made is that the distinction between the agencies and properties involved in the cases aforesaid and private individuals with their private property, is so broad and plain as clearly to require other and distinct reasons than any thing stated in those decisions, to show why the act of entering into private contracts respecting private matters, fall

within the regulating power of congress. And this brings us to a consideration of the limitation in the constitution itself, which we maintain forbids such an interference on the part of congress.

The power to regulate commerce is so limited by the guaranteed liberty of contract as to forbid congress from interfering with private contracts concerning subjects of a private character.

The fifth amendment provides that:

"No person shall . . . be deprived of life, *liberty*, or property, without due process of law."

In *Barron* v. *The Mayor and City Council of Baltimore*, 7 Pet. 243, it was held that this amendment was a limitation on the exercise of power by the Government of the United States, and not upon legislation of the states.

Mr. Chief-Justice Marshall, in the course of the opinion, on the same page, said:

"The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted *in the instrument itself;* not of distinct governments, framed by different persons and for different purposes.

"If these propositions be correct, the fifth amendment must be understood as restraining the power of *the general government*, not as applicable to the states." (Italics ours.)

Since the passage of the anti-trust act was the first attempt of congress to restrain the freedom of contract as between private persons touching subjects of a private character, we rely upon the constructions placed by this court upon similar language to the quoted portion

aforesaid of the fifth amendment, to support our contention that the amendment placed a limitation upon the right of congress under the commercial power to restrict the liberty of contract.

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, this court had occasion to pass upon the power of one state to forbid the making of an insurance contract in another state respecting property located in the former. At p. 589 Mr. Justice Peckham, in speaking for a unanimous court upon the subject of liberty of contract, said:

"It was said by Mr. Justice Bradley, in *Butchers' Union Company* v. *Crescent City Company*, 111 U. S. 746, 762, in the course of his concurring opinion in that case, that 'the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen.' Again, on page 764, the learned justice said: 'I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.' And again, on page 765: 'But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen.' It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word 'liberty' as contained in the Fourteenth Amendment.

"Again, in *Powell* v. *Pennsylvania*, 127 U. S. 678, 684, Mr. Justice Harlan, in stating the opinion of the court, said: 'The main proposition advanced by the defendant is that

his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law. It was there held, however, that the legislation under consideration in that case did not violate any of the constitutional rights of the plaintiff in error.'

"The foregoing extracts have been made for the purpose of showing what general definitions have been given in regard to the meaning of the word 'liberty' as used in the amendment, but we do not intend to hold that in no such case can the state exercise its police power. When and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises.

"Has not a citizen of a state, under the provision of the federal constitution above mentioned, a right to contract outside of the state for insurance on his property—a right of which state legislation can not deprive him? We are not alluding to acts done within the state by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of the Hooper case (*supra*), and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the state, and as such was a valid and proper contract. The act done within the limits of the state under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the federal constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the federal constitution the defendants had a right to

perform. This does not interfere in any way with the acknowledged right of the state to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the federal constitution."

We cite this much of the decision of this court for the double purpose of showing that the word "liberty," as used in the Fifth Amendment, includes the liberty of making private contracts, and that the anti-trust act is not due process of law.

Butchers' Union Co. v. *Crescent City Co.*, 111 U. S. 746, 762, 764, 765.

Indeed, we might have cited the fourth article of the constitution as a limitation upon the commerce power. We might also have relied upon the words "liberty, and the pursuit of happiness," as used in the Declaration of Independence, as a limitation upon the commerce power. This latter suggestion is in principle expressly laid down by the Supreme Court of Ohio in *State* v. *Ferris*, 53 Ohio St. 314.

If it were necessary to say any thing in support of the policy of maintaining the liberty of contract, we could not do better than to use the language of Sir George Jessel, M.R., in the case of *Printing and Numerical Registering Co.* v. *Sampson*, *L.R.*, 19 Eq., at p. 465:

"If there is one thing which more than any other public policy requires, it is that men of full age and competent undetstanding shall have the utmost liberty of contracting."

In developing this argument, we shall derive aid by referring to some well-settled principles laid down by this court. For instance, *Robbins* v. *Taxing District*, 120 U. S., 489, belongs to a class of cases which, in substance, decide that it is interstate commerce to negotiate or contract in one

state for the sale and delivery to the purchaser in that state of goods then located and owned in another state. Would it be said, however, that if certain citizens of the state in which the orders for such sales were solicited should enter into a contract not to entertain any such orders or make any such contract, they would be amenable to any form of action which might be brought under the anti-trust act?

Again, *Coe v. Errol*, 116 U. S. 517, 527, 528, and *Kidd* v. *Pearson*, 128 U. S. 1, 24, 25, decide, in substance, that an owner or manufacturer of goods within a particular state, who in good faith intends to transport his goods into another state the moment he is able to do so, can not escape taxation or the exercise of other lawful power on the part of the state in which the goods are located or manufactured. The principle of this class of cases evidently is that mental operation on the part of the owner of an article will not make the article a subject of commerce or the decision of the owner a part of commerce, no matter how serious in his conviction the owner may be. Suppose, then, a number of such owners or manufacturers should enter into a contract between themselves not to ship any of their products beyond the limits of their state or to sell the same for such purpose, would it be held that they thereby rendered themselves amenable to any form of action which could be brought under the anti-trust act?

It is to be observed of the class of persons making the first contract supposed, that they are simply placing upon themselves a voluntary obligation not to enter into interstate commerce; and the same thing is true as regards the class of persons making the supposed second contract.

It is to be observed, also, that we are engaged in the discussion of the power of congress to regulate commerce and not of any power of the state in which such persons reside to forbid such contracts.

If, under the hypotheses stated respecting contracts be-

tween individual citizens of a state, it should be said that the persons would render themselves amenable under the anti-trust act, then it would have to be shown that the liberty of contracting does not enable persons to bind themselves not to make contracts. The logic of any such claim is that even two persons could not do so. Yet, as it seems to us, it is not possible to differentiate such contracts from the principle laid down in ~~Addyston v. Tuscay District on the one hand, and~~ *Coe* v. *Errol* and *Kidd* v. *Pearson* ~~on the other~~; because if any of the parties themselves to any such contract were to seek its annulment, they could only allege a purpose to import goods in the one case and to export them in the other if freed from the obligation of the contract. This would clearly leave them within state jurisdiction exclusively, and so deny to them the right to claim they were within federal jurisdiction. The mere purpose or intent to enter into interstate trade or commerce would not be sufficient to change their status.

Indeed, to say that congress could provide for thus controling the freedom of contract of citizens of a state, would inevitably lead to the further right to prescribe attributes which should determine capacity of such persons to contract at all; to prescribe conditions upon which they could or could not enter into trade which would even indirectly involve interstate commerce; to prescribe and limit the conditions upon which suit should be brought or recovery be had upon contracts so authorized; and, in short, to prescribe by positive law a code of rights and wrongs and procedure respecting all such contractual relationships. Surely such an enlargement of power in congress is as difficult to understand as its logical and ulterior limits are difficult to forecast. It is always legitimate argument, however, to test the soundness of a claim by examining into the extremes which its logical tendency will lead to. Reflection here will render it

hard to see what function the states shall have if the power of congress is to be thus expanded.

Would not all such questions as we are discussing naturally belong to the states in which the contracts were made? Would not such evils, if evils they are, have to be remedied by those states either through their legislatures, their courts, or both? Do not the principles laid down in the *License Tax* cases (5 Wall. 462) require these questions to be answered in the negative? Is not the same true also of the principles announced in the *Civil Rights* cases (109 U. S. 3), when the commercial power and prohibition against Federal invasion of the liberty of contract, are read and construed *together*, and *both* are given due scope and effect?

It is to be observed that before these questions can be answered otherwise than in the negative, it must be shown that even if the anti-trust act had not been passed, any party to the contracts supposed could have invoked Federal jurisdiction to have the contract annulled, upon the sole ground that the commerce clause was violated; for it is settled that no legislation on the part of congress signifies free trade among the states.

When reduced to its last analysis, the real question is whether these men would, under their liberty of contracting, be entitled to make a choice of contracts. When entering into a contract not to engage in interstate trade or commerce, they would have the choice of either making that contract, or of making contracts respecting such traffic. To say that they shall not exercise this choice is to say that they shall not have the freedom of selecting the course which they think will best subserve their interests. Are those persons, or is congress, the better judge of which course they should pursue? What does the liberty of contract signify if the individual himself shall not have the untrammeled right of choice? We do not say that he should have the right to make contracts against the policy of his state. For

he owes it to his state so to preserve his freedom, as both to support himself and his family, and so avoid the necessity of his state having to support them. There is, however, no such reciprocity existing between a citizen of a state and the Federal Government, even though he is a citizen of the United States as well.

It seems to us that such contracts as those supposed would be beyond the reach of the federal control under two conclusions reached by this court in the Hopkins case, the one touching the right of persons to contract to abstain from telegraphing the conditions or quotations of the markets to persons in other states (171 U. S., at p. 599); and the other concerning the right by contract to limit the number of solicitors to be employed, the court saying of the latter:

"But cannot the citizen for what he thinks good reason, contract to curtail that right? To say that a state would not have the right to prohibit a defendant from employing as many solicitors as he might choose, proves nothing in regard to the right of individuals to agree upon that subject in a way which they may think the most conducive to their own interests. What a state may do is one thing, and what parties may contract voluntarily to do among themselves is quite another thing." (*Ibid.*, at p. 603).

And further, in the same case, at p. 593, Mr. Justice Peckham had occasion to state some illustrations which seem to us apposite here. Referring to contracts made between private citizens which might affect interstate trade and commerce, and alluding to the transportation of cattle and their requirements for rest, food and water, the learned Justice said:

"Would an agreement among the land-owners along the line not to lease their lands for less than a certain sum be a contract within the statute as being in restraint of interstate trade or commerce? Would it be such a contract even if the lands, or some of them, were necessary for use

in furnishing the cattle with suitable accommodations? Would an agreement between the dealers in corn at some station along the line of the road not to sell it below a certain price be covered by the act, because the cattle must have corn for food? Or would an agreement among the men not to perform the service of watering the cattle for less than a certain compensation come within the restriction of the statute? Suppose the railroad company which transports the cattle itself furnishes the facilities, and that its charges for transportation are enhanced because of an agreement among the land-owners along the line not to lease their lands to the company for such purposes for less than a named sum, could it be successfully contended that the agreement of the land-owners among themselves would be a violation of the act as being in restraint of interstate trade or commerce? Would an agreement between builders of cattle cars not to build them under a certain price be void because the effect might be to increase the price of transportation of cattle between the states?" etc.

We may derive assistance too from the case of *Veazie* v. *Moor*, 14 How. 568. It is true that the question there involved was the right of the State of Maine to grant the exclusive privilege of navigating a certain portion of the Penobscot river to a certain company which was to improve it, the river being wholly within the state and being seriously obstructed, but in sustaining the enactment, this court, after speaking of the claim that certain products would become the subjects of foreign commerce, and consequently the statute was void, said at p. 574:

"A pretension as far-reaching as this, would extend to contracts between citizen and citizen of the same state."

There is another way of testing the soundness of our contention. It is seriously urged by the solicitor-general that it was incompetent for these appellants to restrict competition even among themselves. Yet it was said by Mr.

Justice Peckham, in the Joint Traffic Case (171 U. S., at p. 567):

"It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade."

How could "two or more producers" employ "the same person to sell their goods on commission" if those producers were at the same time in active, persistent, continuous competition among themselves? The very fidelity which an agent owes to his principal would render his position inconsistent and untenable. Those producers would have to agree upon common prices for the sale of their goods through such common agency. This would necessarily be a restriction of competition as between themselves. Yet, if the liberty of contracting does not extend as far as the learned justice states it, then we submit that the freedom thus guaranteed might as well be altogether denied. It is governing too much to forbid such arrangements. The converse of this, however, must likewise be so. If they may agree not so to compete, why may they not agree not to sell at all? Why may they not agree not to sell to particular persons, say non-residents? Why, in short, may they not agree not to enter into interstate trade or traffic?

Why, then, should not the claim we have urged from the beginning be the true one? That since the police power of the state is as broad as the taxing power (*Kidd* v. *Pearson*, 128 U. S. 1), and since all such contracts as we are considering would, under the hypotheses stated, be made at a time when both the individuals and their property would be within the jurisdiction of their state, and would consequently be subject to the ordinary municipal and taxing powers of the state, it should, we think, seem clear and convincing that the contracts themselves and the rights of the parties to

them would be subjects for state control and not federal control.

As is said by Mr. Chief-Justice Fuller in the Knight case, 156 U. S., at 13:

"It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

The result is that the anti-trust act should be construed as not intended to include private contracts.

True, the act was held to be constitutional in the *Joint Traffic* case. But the contract in that case was between quasi-public agencies concerning quasi-public property which was acquired and held and used to transport interstate commerce. The distinction has been argued. The reason for the anti-trust act is to be found in the need for constant regulation of the great public instruments of commerce among the states, but there is no need of the act to regulate merely private contracts; and to construe it as designed for that purpose is to ascribe to congress an intent to invade the citizen's freedom of contract, and also to usurp the state's municipal control of its citizens.

This can not be met by the class of decisions of this court which, in substance, hold that where the constitution vests power in congress over a subject, it will be construed to have bestowed the whole power, with appropriate means to carry it into execution; for those very decisions, as already

pointed out, recognize that the means adopted to carry out the powers must not themselves conflict with the constitution.

Profitable discrimination might be made here. For instance, certain principles laid down in decisions like those in the *License Tax* and *Civil Rights cases*, to the effect that constitutional prohibitions warrant annulment of acts passed in violation of them, but do not in the absence of express power authorize congress to adopt a system or code of laws either to enforce prohibitions or to prevent their violation. The Fifth Amendment is a prohibition. It is a prohibition against congress. It does not provide for its enforcement by laws of congress. Is it nevertheless to be said that the commerce clause supplies the authority? Such a claim is without precedent. It is without reason as well; for that would merge the prohibition into the power; it would be to destroy the one for the aggrandizement of the other.

The true solution lies in treating the prohibition as intended to forbid congress from invading the domain of private contract at all, under the guise of legislating to regulate commerce; or, in other language, in treating the Fifth Amendment as a limitation upon the commercial power. This will be in harmony with all the decisions since *Gibbons* v. *Ogden*, which hold that we must look to the constitution for limitations upon the commerce clause. It will not conflict either with any thing said in any other decision, say like that in the Debs case (158 U. S. 564); for there no constitutional limitation intervened.

It would be no answer to suggest that the liberty of contract does not warrant the making of invalid contracts. For the very inquiry is whether the matter of validity or not is within the purview of the federal constitution. The suggestion, therefore, begs the question. If the act of making a private contract is in the sense under debate the same as the act of passing a state statute, then the former act as well

as the latter may be made the subject of federal regulation, no matter whether the contract be in reality valid or invalid. If the two acts are not alike, it is because the liberty of contract protects the private citizen of a state against federal interference under the commercial power, and leaves him amenable alone in that regard to the state municipal law. This relegates the whole subject of validity or invalidity of private contract to the laws of the states. We do not claim that a state could *authorize* its citizens to make contracts to injuriously affect interstate trade or commerce. We concede that such act of *the state* would be an act falling within the commercial power. But the liberty of contract was not derived from the federal constitution. It was guaranteed by that instrument; and congress was forbidden to interfere with it. The citizen derived the liberty of contract from his Creator. "All men . . . are endowed by their Creator with certain inalienable rights; that among these are life, *liberty*, and the pursuit of happiness."

This inalienable right, liberty, including as it does the liberty of contract, was crystalized into the form of a guaranty through fear of encroachments on the part of the general government. In *Barron* v. *Mayor and City of Baltimore*, *supra*, Mr. Chief-Justice Marshall spoke of the reason for and the history of the Fifth Amendment thus:

"But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, *might be exercised in a manner dangerous to liberty*. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments

demanded security against the apprehended encroachments of the general government—not against those of the local governments.

"In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court can not so apply them." (Italics ours.)

In *Boyd* v. *United States*, 116 U. S. 616, after speaking of the Fifth Amendment (in connection with the Fourth) as a prohibition, and also of unconstitutional practices gaining their first footing "by silent approaches," Mr. Justice Bradley, at page 635, said:

"This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property"—the learned justice would obviously have included liberty, if the case had called for its consideration—"should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

II.

BUT IF IT SHOULD BE HELD THAT THE COMMERCE CLAUSE WAS INTENDED TO REACH PRIVATE CONTRACT IN THE SAME SENSE AS A STATUTE OF A STATE, STILL IT IS CARRYING THE POWER OF CONGRESS FURTHER THAN IT WAS EVER BEFORE PRESSED, TO USE IT TO DESTROY PRIVATE CONTRACTS, WHICH ARE COLLATERAL TO THOSE MADE FOR THE PURCHASE, EXCHANGE OR TRANSPORTATION OF ARTICLES OF COMMERCE.

No definition of commerce has ever been made which includes such collateral contracts. It is true the definitions embrace contracts in their descriptions of what commerce includes, and, in consequence, of what the states can not interfere with. But what kind of contracts?

And here we wish to point out an error into which we think the solicitor-general has fallen. He says that, because the definitions of commerce include *contracts*, the contract between these appellants is included. But their contract was among *themselves*. It preceded in point of time every thing in the way of commerce. It involved no intercourse with strangers. It was a contract between themselves that they would not enter into commercial intercourse or negotiation or into contracts with any one except in a certain way and upon certain conditions. It is only the commercial contract—it is not the private contractual relationship between parties like these—which the definitions of commerce refer to.

The learned counsel, however, says that this distinction and argument would have applied to the *Trans-Missouri* and *Joint Traffic* cases. (B., p. 52.) But this ignores the difference between common carriers and their relations to their property on the one hand, and these appellants and their relations to their property on the other. The common car-

riers are *bound* to take articles from every body for transportation. They can not hold their roads and refuse business. Their roads are public highways—public instrumentalities of commerce—and the carrier companies are public agencies. All this, however, is different with private corporations organized to manufacture a private article, like cast-iron pipe. They are not bound to make or sell pipe. They can refuse to do either and still hold their property. They, in short, belong to the category of private individuals, respecting their private property and business. Now, these differences mark an important distinction with important consequences. The common carriers have not, and private persons have, exclusive dominion and control over their properties. When, therefore, the common carriers agree among themselves not to do business except on conditions to suit themselves, they violate the law. If they are interstate carriers, as they were in the *Trans-Missouri* and *Joint Traffic* cases, they violate the anti-trust law. They are public bodies, and, when so contracting, are guilty of public acts, the same as if the states themselves which authorized their corporate being and traffic were to do such acts. But none of these things are so in respect of private corporations or persons. They are simply in the exercise of private rights, respecting private property, when agreeing to refuse to contract except upon conditions. They are in the exercise of the liberty of contract. They are engaged in collateral undertakings, therefore, radically different from those of public interstate common carriers. The solicitor-general evidently saw this when he vainly tried to show that the manufacture and sale of cast-iron pipe is a matter of public concern in the sense that the property bears the impress of a public nature or character.

We recognize that in this branch of the argument we have necessarily repeated portions of the argument made on the question of total want of power in congress to reach

private contracts. But the truth is that much of that argument will apply with equal force to the feature we are now arguing. For when we contend, as we do, that no private contract is within the control of congress, we necessarily include all private contracts. We are now, however, arguing that even though it would reach private contracts, it would not reach all kinds of private contracts. The commercial power could not, in any event, fairly be said to have been intended to apply to any sort of private contracts except those which control, and inevitably involve, interstate trade or commerce. The contract with which we are concerned here was, as stated, wholly collateral to any commercial contract.

There is another view in which the collateral nature of the contract in question may be seen. It was said in the Knight case that "commerce succeeds to manufacture." Sales are a part of commerce. Sales of pipe must, therefore, succeed to manufacture. It follows that if commerce succeeds to manufacture sales also must succeed to manufacture. The contract, however, which is assailed in the present cause precedes both manufacture and sales. How, then, can it be said to be any thing except an arrangement collateral to every thing included within any definition or meaning of commerce?

The whole scope of commerce among the states has been defined by such cases as *Coe* v. *Erroll*, *Kidd* v. *Pearson* and *United States* v. *E. C. Knight Co.* These cases mark the boundaries between which is included the whole commerce that is subject to national regulation, and over which congress has full and exclusive control. This commerce is thus described by Mr. Chief Justice Fuller in the Knight case (156 U. S., at 13): "Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the states,

or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce."

This is a definition of commerce under the anti-trust act, and as thus stated, it includes the contracts of purchase or sale that initiate a transportation from one state to another and that end the transportation; it also includes the instrumentalities and means of transportation.

Within the limits thus stated congressional power is full and exclusive. The articles of commerce while in transportation are likewise the subject of regulation under the constitution, so that cattle or commodities while in the course of transportation may be the subject of national inspection laws or police regulations controlling them in transit. But the only *contracts* within the power to regulate commerce are contracts to *buy* or *sell* and which initiate or end a transportation.

It is now asked to extend the rule, as heretofore adjudged, so as to bring within the scope of the commerce clause all that great variety of contracts that may operate to hinder "contracts to buy, sell, or exchange goods to be transported."

This extension will carry the Federal Government into that field which Chief-Justice Marshall designated as "that immense mass of legislation, which embraces every thing within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves."

Gibbons v. *Ogden*, 9 Wheat. 203.

In the same case, at page 194, a part of this "immense mass of legislation" is referred to as "that commerce, which is completely internal, which is carried on between man and man in a state."

The contracts which restrain or hinder "contracts to buy, sell, or exchange goods to be transported," are com-

pletely internal and between man and man within a state. But as they do or may—though only indirectly—restrain or hinder the contracts that are a part of the external commerce, the solicitor-general asks that the jurisdiction of the general government be extended so as to include them.

III.

ERRONEOUS INFERENCES FROM SECRESY AND CERTAIN ACTS OF SPECIAL INDIVIDUALS.

There are two features of the contention made on the part of the government in relation to the evidence, to which we wish briefly to call attention. One is that these appellants did their work secretly and with a view of deceiving the public. But is the secresy under which a business is conducted the necessary and true test of its validity? Men differ materially in their methods of conducting the same class of business. Some will make large display of every thing they do, while others will conceal their plans and methods altogether. If these appellants had done openly what some or all of them did secretly, it is doubtful whether any one would have placed any severe criticism upon their acts. If they had declared their purpose to exercise their liberty of contract and deal with people only as they chose and upon such conditions as suited them, who could rightfully have complained? We do not mean by this to argue any question of morals. We seek only to show and emphasize the irrelevancy of the criticism of secresy upon the question of interference, either in design or effect, with interstate commerce. How could it have affected that at all?

Another feature is that the solicitor-general seizes upon letters or statements of one or two individuals, such as Mr. Thomasson, and the informer, McClure, and makes them the basis for severe criticism. It will be borne in mind that

McClure was Thomasson's private secretary. Now, whatever may have been Mr. Thomasson's individual views touching process or methods of doing business, surely we do not obtain an accurate survey of the views and conduct of all of the parties to the plan or agreement through Mr. Thomasson alone or his private secretary. They were not in harmony with the others. They, therefore, do not and can not reflect the views and methods of business of the others.

But, however these matters may be, it seems to us that counsel is taking a narrow view of a very broad subject to seize upon occasional sayings of a particular person in order to characterize the whole transaction, and so try to divert attention from the real question and its larger scope and meaning. The question whether this contract or arrangement can be reached under the power to regulate commerce is of far broader significance than the mere method of its execution.

We have now reached a point where our original briefs present all the authorities and arguments we wish to offer in support of our contention that the plan in question here and its execution could not, and in truth did not, affect interstate trade or commerce in any manner, except indirectly and remotely, and without any purpose or intent on the part of any of appellants to affect such trade or commerce in any manner whatever.

Respectfully submitted,

JOHN W. WARRINGTON,
FRANK SPURLOCK,
For Appellants.

BROWN & SPURLOCK,
PAXTON, WARRINGTON & BOUTET,
Counsel.